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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

DELPHINE ALLEN, et al.,)	
)	No. 00-cv-04599 WHO
Plaintiffs,)	
vs.)	CITY OF OAKLAND'S RESPONSE
)	TO INDEPENDENT MONITOR'S
CITY OF OAKLAND, et al.,)	SIXTY-FIFTH REPORT
)	
Defendants.)	
)	
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1 The City thanks the Independent Monitor for the *Sixty-Fifth Report* on Tasks
 2 24, 25, 26, and 30. Dkt. No. 1347, *65th Report* (Dec. 19, 2019). After carefully
 3 reviewing the report, the City respectfully submits the following response.

4 **TASK 26—FORCE REVIEW BOARDS**

5 The Department convenes Force Review Boards to critically review the use of
 6 Level 2 force, hold its officers accountable, and enhance its policies and practices. *See*
 7 *OPD General Order K-4.1* (Dec. 15, 2016). Since 2014, the Department has been in
 8 compliance with Task 26. *See 57th Report*, Dkt. No. 1219, at 5 (Nov. 2,
 9 2018)(discussing the City’s compliance history). Over the past five years, the IMT has
 10 observed over 60 FRBs, and over 95% percent of the time, the IMT agreed with the
 11 Boards’ findings on whether force was used within policy. At least once before, the
 12 Board and the IMT have reached different conclusions. *Id.* Overall, though, the IMT
 13 has “consistently found review boards to be detailed and thorough.” *Id.*

14 Most recently, the IMT reviewed six FRBs that were held this year. Dkt. No.
 15 1347, *65th Report*, at 12 (Dec. 19, 2019). The IMT disagreed with one of the Board’s
 16 findings in one case. *Id.* As for that case, the IMT wrote that it “agreed with all of the
 17 Board’s concerns regarding scene supervision and the need to use force at the time it
 18 was used, and we were quite frankly surprised that they voted the force in compliance
 19 with little deliberation.” *Id.* at 13.

20 To begin with, the Department has made clear that it strongly prefers different
 21 tactics in the subject scenario. To that end, the Board and Chief Kirkpatrick agreed
 22 that the scene supervisor should receive discipline for not exercising better control and
 23 not making better tactical plans. Further, the Board ordered the supervisor’s Captain
 24 and Lieutenant to assess the training he needs to improve in those areas.

25 In addition, the Board ordered the Department’s Training Division to review its
 26 Crisis Intervention Team curriculum to make sure that the Department is following
 27 the best practices for interacting with people who are experiencing mental health

1 crises. The Board also ordered the Training Division to assess whether one of its
2 subject matter experts in this field should continue to serve in that role.

3 The City believes that all this demonstrates that the Board followed a “detailed
4 and thorough” FRB process. The Board carefully reviewed all the relevant records,
5 video footage, and policies. Over two sessions, the Board scrutinized this evidence,
6 heard from four subject matter experts, and had meaningful exchanges with each
7 other and the IMT. The Board then wrote a detailed, 33-page report with
8 recommendations on discipline, training, and policy.

9 The FRB report makes plain that there were pointed and probing
10 deliberations. The Board immediately saw the need for accountability and for a better
11 approach. At the same time, the Board recognized that the question of whether the
12 use of force itself failed to comply with the law and the Department’s policy and
13 training was a separate issue.

14 On that question, the Board and Chief Kirkpatrick each deliberated
15 extensively. Chief Kirkpatrick, for instance, asked two respected outside subject
16 matter experts on force—one a retired chief and the other a leading expert in the
17 state—to review the policy and body camera footage. Both experts found that the use
18 of force complied with the law and Department policy.

19 This case prompted the Department to evaluate changes to both policy and
20 training. As a result, the Department may now propose revisions. During the FRB,
21 though, the Board considered and interpreted existing policy.

22 In sum, two things are true: the process was searching, and reasonable minds
23 differ on one of the Board’s findings. The Board’s conclusions are supported by specific
24 Ninth Circuit cases, policies, training, and evidence. And the Department did not shy
25 away from handing down discipline it expects to uphold.

26 Given all this, combined with the Department’s strong compliance history on
27 this task, the City seeks guidance on the compliance metric that applies. Task 26

1 nowhere sets forth a mandate that the Board and the IMT agree on every finding in
 2 every case. Yet taking the City out of compliance based on a disagreement over one
 3 finding may suggest such a standard. Even though the City aims to hit that mark,
 4 reasonable minds will sometimes differ, and that test is not workable.

5 **TASKS 24 AND 25—FORCE REPORTING**

6 The IMT reviewed 55 cases involving the use of Level 3 or Level 4 force. *Id.* at
 7 2. The report notes that African Americans made up 52% of the population against
 8 whom those types of force were used. *Id.* at 3. Those disparities remain deeply
 9 troubling to the City’s leaders, and reducing them is at the heart of the Department’s
 10 investment in VISION, its data analysis, its revised recruitment practices,
 11 collaborative policy revisions, and the City’s ongoing work with Stanford.

12 The report also notes that in no case was the use of force “inappropriate or
 13 excessive.” *Id.*

14 As for force reporting—which is the focus of the IMT’s review of Tasks 24 and
 15 25—the report recognizes that “OPD has now taken numerous steps to address the
 16 proper reporting of use of force and the concerns that have been identified.” *Id.* at
 17 5. With new force-reporting training and directives, the Department is capturing far
 18 more Level 3 and Level 4 uses of force. *Id.* at 4. And those increases, the IMT notes,
 19 “do not appear to signal a rise in the actual use of force.” *Id.* at 5.

20 The report shows that during the review period, the Department was in 100%
 21 compliance with subtasks 24.1, 24.4, 24.6, 25.1, and 25.2 (the IMT did not review
 22 subtask 25.6). Further, the IMT reviewed 74 instances in which an officer pointed a
 23 firearm, and 100% of the time, the pointing was appropriately reported.

24 Lastly, the report raises concerns about failed or late body-camera activations
 25 and about boilerplate language in force reports. *Id.* at 4. As noted in the IMT’s report,
 26 the Department is working to correct both issues. *Id.*

TASK 30—EXECUTIVE FORCE REVIEW BOARDS

The IMT has found that 17 of the past 18 EFRBs complied with the NSA. *See JCMS*, Dkt. No. 1240, at 16-17 (March 22, 2019). The report notes that there has been no EFRB in 2019. Dkt. No. 1347, *65th Report*, at 15 (Dec. 19, 2019). The City remains committed to holding independent and rigorous review boards. To that end, the City has requested to have a non-voting outside observer participate in EFRBs. The City would like to work with the IMT to implement this procedure.

CONCLUSION

The City looks forward to continue working with the IMT and the parties.

Respectfully submitted,

Dated: December 24, 2019 BARBARA J. PARKER, City Attorney
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